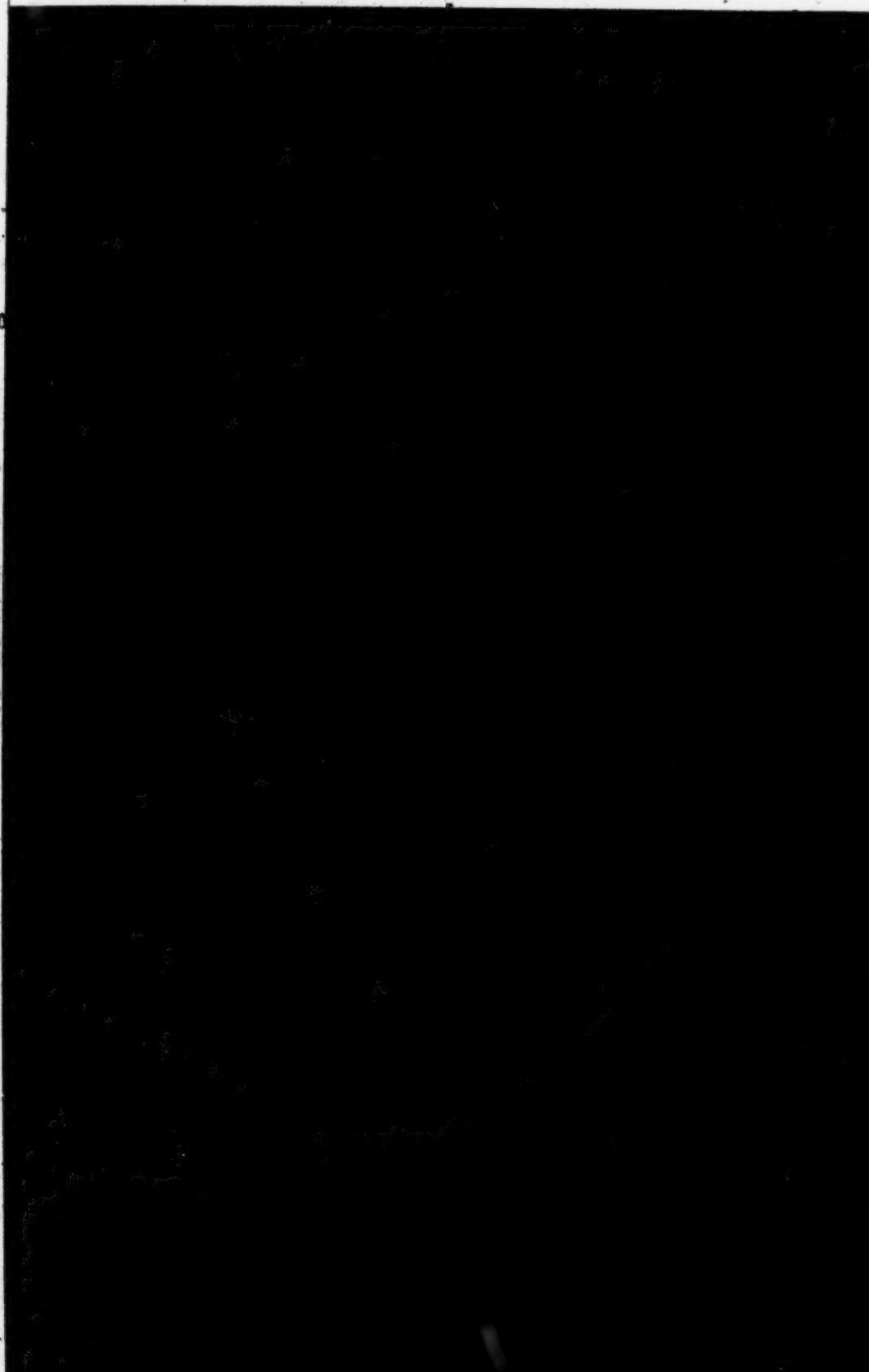

No. _____

IN THE

Supreme Court of the United States

October Term, 1966

HARRY S. KRAKOFF, ADMINISTRATOR OF THE ESTATE OF WILLIAM F. DONNELL,

Plaintiff-Appellant,

vs.

PAUL RUBLE WEAVER, MICHIGAN MUTUAL LIABILITY CO.,

Defendants-Appellees.

Appeal from the Supreme Court of the State of Ohio

MOTION TO DISMISS APPEAL

Appellee, Michigan Mutual Liability Company, moves the Court to dismiss the appeal herein on the following grounds:

I. The appeal is not within the jurisdiction of this Court because not taken in conformity to statute or to the rules of the Supreme Court.

Rule 15 of the Supreme Court Rules, Section (i) provides that in an appeal from a State Court "there shall also be appended to the statement a copy of the order, judgment or decree appealed from." We do not find any such copy appended to the jurisdictional statement filed herein and it is impossible to tell the nature of the judgment from

which the appeal is taken. On page 10 of the Appellant's jurisdictional statement we find that on September 21, 1966 the Supreme Court of the State of Ohio refused to certify and that the motion for rehearing was denied on October 26, 1966. This statement correctly indicates that the Supreme Court of Ohio did not pass on the case on the merits. The appeal is not properly taken from the Supreme Court of Ohio but could only be taken from the judgment of the Court of Appeals of Franklin County which the Supreme Court of Ohio refused to review. *Randall v. Board of Commissioners*, 261 U. S. 252, 67 L. Ed. 637, 43 S. Ct. 252; *Mellon, Director General v. O'Neil*, 275 U. S. 212, 72 L. Ed. 245, 48 S. Ct. 62.

Furthermore, the construction of Section 2311.34 of the Revised Code of Ohio which Appellant claims violated the United States Constitution was made in the judgment of the Common Pleas Court in the year 1964 pursuant to the opinion which is denominated "decision" and is Appendix (C) of Appellant's statement. The Common Pleas Court refused to grant the representative of the plaintiff the right to revive the case because the application to revive was not made within the one year period of limitation set forth in Sec. 2311.34 of the Revised Code of Ohio. That decision was reviewed and affirmed by the Court of Appeals of Franklin County in 1965. The Supreme Court of Ohio overruled a motion to certify on May 19, 1965. (See Paragraph VI, page 9 of Appellant's statement.) Since this judgment was rendered in 1965 the appeal was not taken to this Court within the time allowed by law.

II. This appeal does not present a substantial federal question.

Appellant claims that he has been deprived of property without due process of law in violation of Amendment XIV

to the United States Constitution. Section 2311.34 of the Revised Code of Ohio sets up a limitation of one year within which a case can be revived by the plaintiff's personal representative after the death of the plaintiff. The Ohio Statute containing that limitation was first enacted in 1853, 51 Ohio Law 57, Section 411. Plaintiff did not seek to revive the action within the time permitted by this statute. In 1965 the Ohio Courts held that the statute of limitations had expired and refused to permit plaintiff to revive the case. We know of no case in which a one year statute of limitations has been held to be a violation of the United States Constitution and the Appellant cites none.

In 1966 the Ohio Courts held that since the procedure provided by Section 3929.06 of the Ohio Revised Code for the joining of an insurance company as a new party was initiated by the decedent, his personal representative had no independent right to initiate such a proceeding and could proceed only by revivor.

The right to join an insurance company as a new party defendant was one which did not exist in the absence of the statutes cited by Appellant and is not a right which arises under the Constitution of the United States. The construction of the Ohio Statutes does not involve a federal question.

No substantial federal question is presented.

It is therefore submitted that the appeal herein be dismissed.

Respectfully submitted,

Vorys, Sater, Seymour & Pease,
By /s/ James O. Seymour,
Attorneys for Appellee, Michigan Mutual Liability Insurance Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

KRAKOFF *v.* WEAVER ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1174. Decided May 22, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.